IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB Plaintiff-Intervenors v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

The United States seeks leave to file a first amended complaint ("Amended Complaint"). The Amended Complaint would add New Source Review claims related to six additional construction projects at coal-fired power plants owned and operated by Defendants. Amending the complaint at this time is the logical next step for this litigation: it will allow the Parties to litigate the full set of Clean Air Act claims against DTE, avoiding "piecemeal litigation." *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973). In addition to the claims at Monroe Unit 2, the Amended Complaint would add NSR claims at five additional units: Belle River Units 1 and 2; Monroe Units 1 and 3; and Trenton Channel Unit 9.

Pursuant to Local Rule 7.1 (a)(2), counsel for the United States contacted counsel for DTE regarding this motion. Counsel for DTE reported that it could not take a position on the

motion until seeing the proposed amended complaint, and so would take no position before the filing of the motion.

The United States respectfully requests that the Court grant this motion for leave to file an Amended Complaint so that the Parties and the Court can resolve the Clean Air Act liability stemming from DTE's pollution-increasing construction projects.

Respectfully Submitted,

ROBERT G. DREHER
Acting Assistant Attorney General
Environment & Natural Resources Division

Dated: September 3, 2013

s/ Thomas A. Benson
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading and supporting materials were served via ECF on counsel of record.

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MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

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ISSUE PRESENTED

Should the United States be allowed to amend its complaint to bring additional New Source Review claims, enabling the Parties and the Court to resolve the existing set of claims all at once rather than in a piecemeal fashion?

LEADING AUTHORITY FOR THE RELIEF SOUGHT

Amending Complaint

Fed. R. Civ. P. 15(a)

Foman v. Davis, 371 U.S. 178, 182 (1962)

Troxel Mfg. Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973)

NSR Operation and Liability

United States v. DTE Energy, 711 F.3d 643 (6th Cir. 2013)

40 C.F.R. § 52.21(a)

The United States seeks leave to file a first amended complaint ("Amended Complaint") to bring Clean Air Act claims at five additional units owned and operated by Defendants. Amending the complaint at this time is the logical next step for this litigation: it will allow the Parties to litigate the full set of Clean Air Act claims against DTE, avoiding "piecemeal litigation." *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973).

The United States filed this action in August 2010 with New Source Review ("NSR") claims related to a recently-completed construction project at Monroe Unit 2. The United States immediately moved for a preliminary injunction to require DTE to obtain NSR permits and install the necessary pollution controls at Monroe Unit 2. In doing so, the United States made plain to DTE and the Court that it was seeking expedited relief with respect to Monroe Unit 2, and would later likely bring additional claims at other units. While DTE has challenged the United States' allegations, it also obtained NSR permits and has proceeded to construct pollution controls at Monroe Unit 2. The company has previously reported that those controls would be operational by Spring 2014. Thus, while the alleged major modification at Monroe Unit 2 remains at issue,[1] there is no longer the need for immediate action that existed when the United States filed the original complaint. It makes sense to add the new claims and resolve all alleged Clean Air Act violations together.

The Amended Complaint (included as Attachment 1) would add NSR claims at five additional units: Belle River Units 1 and 2; Monroe Units 1 and 3; and Trenton Channel Unit 9. While the details of each project are different, the United States' claims for each project are similar to the claims in the original complaint. In each case, the United States alleges that DTE should have obtained NSR permits before proceeding with major component replacement

[1] In addition to the pollution controls that DTE is installing, the United States will seek a penalty and mitigation of prior environmental and human health harm from any violation.

projects costing millions of dollars each. In each case, the United States alleges that DTE should have anticipated that the construction projects would result in increased pollution. Finally, for the new claims alleged in the Amended Complaint, actual pollution did increase after the project – just what DTE has previously argued should be the trigger for NSR liability.

The United States respectfully requests that the Court grant this motion for leave to file an Amended Complaint so that the Parties and the Court can resolve the Clean Air Act liability stemming from DTE's pollution-increasing construction projects.

BACKGROUND

I. Procedural History Of The Case

EPA first issued a Notice of Violation to DTE in July 2009 ("July 2009 NOV"). That notice alleged NSR violations related to 35 prior construction projects. In Spring 2010 DTE performed an additional project at Monroe Unit 2. The United States issued a Notice of Violation for that project in June 2010, and then filed suit on that project in August 2010. Once this case was filed, the United States immediately sought a preliminary injunction requiring DTE to begin construction of pollution controls on Monroe Unit 2. The Court denied the motion for preliminary injunction, and proposed that the Parties conduct an expedited trial on the Monroe Unit 2 claims. Att. 2 (Excerpts of Preliminary Injunction Transcript) at 136-137. The Parties accepted the Court's proposal for an expedited trial, which was originally scheduled for May 2011 and later moved to September 2011.

In August 2011, the Court dismissed the Monroe Unit 2 claim. That dismissal was reversed on appeal, so the Monroe Unit 2 claim is back before this Court. In remanding the case to this Court, the Sixth Circuit made clear that, "A preconstruction projection is subject to an

enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations." *United States v. DTE Energy*, 711 F.3d 643, 652 (6th Cir. 2013).

The Parties recently completed briefing on DTE's new motion for summary judgment, and the Court has set a status conference for October 9, 2013. There is no schedule beyond the status conference.

From the beginning of this litigation, the United States has made clear that it might later amend its complaint to add additional claims. A day after filing the original complaint, the United States' preliminary injunction brief cited the July 2009 NOV and explained that its complaint "may be amended to allege additional claims." ECF 8 at 13. The Parties then discussed the issue with the Court at the preliminary injunction hearing in January 2011. DTE counsel noted that the July 2009 NOV alleged violations from 35 other projects, and the undersigned counsel responded that for purposes of the expedited trial proposed by the Court and then planned for May 2011, the government anticipated focusing on the Monroe Unit 2 claim alone. Att. 2 at 141-142. The undersigned clarified that "the Government is still considering whether or not to bring additional claims." *Id.* at 142.

On March 3, 2013, EPA issued a new Notice of Violation ("March 2013 NOV") to DTE. That NOV provided notice of three additional construction projects violating NSR, and clarified aspects of the July 2009 NOV. The United States now seeks to amend its original complaint in this case to add claims from the July 2009 NOV and the March 2013 NOV.

II. New Claims

The Amended Complaint includes the original Monroe Unit 2 claim and adds six new claims at six units owned and operated by the Defendants.[2]

[2] References to DTE or Defendants in this brief include both DTE Energy Company and the former Detroit Edison Company, which has changed its name since the original complaint was filed to DTE Electric Company.

A. Units at Issue in the Amended Complaint

The Belle River Power Plant consists of two units of approximately 670 MW (gross) each that began operating in 1984 and 1985. Belle River is located in East China, Michigan, on the shore of the Belle River and approximately 50 miles northeast of Detroit. The Amended Complaint alleges violations at both Belle River units.

The Monroe Power Plant consists of four units of about 820 MW (gross) each that began operating in the early 1970s. The plant is located in Monroe, Michigan, on the western shore of Lake Erie and approximately 40 miles southwest of Detroit. The Amended Complaint alleges violations at Monroe Units 1, 2, and 3.

The Trenton Channel Power Plant has five units: four small units of about 60 MW each and one larger unit of about 540 MW (gross). The smaller units are known as units 16-19 and began operation in 1949 and 1950. The larger unit is known as Trenton Channel 9 and began operation in 1968. The plant is located in Trenton, Michigan, next to Slocum's Island in the Detroit River and about 20 miles southwest of Detroit. The Amended Complaint alleges violations at Trenton Channel Unit 9.

B. Claims in the Amended Complaint

The Amended Complaint adds NSR claims at six units. While the facts are different, the underlying legal claims are similar to those alleged in the original complaint. Under the applicable NSR rules (as described in more detail in the Amended Complaint and prior briefing) a source must obtain a permit if it should expect emissions to increase as a result of a planned construction project. In addition, if pollution actually does increase after the project as a result of the work, the source must obtain a permit at that time. In determining whether an NSR-triggering pollution increase is predicted or has occurred, the source must compare its prediction

and/or actual pollution to the pollution generated during a "baseline" period for the unit. For electric generating units like those at issue here, the baseline must come from the five years immediately preceding the project.

The Amended Complaint describes the construction projects at each unit that trigger NSR liability. The company should have expected that those projects would increase pollution. Had DTE correctly followed the NSR regulations, it would have predicted significant pollution increases and been required to get NSR permits. Moreover, for each new project in the Amended Complaint, actual pollution did increase, providing a second, independent basis for triggering NSR. Notably DTE has argued throughout this case that actual pollution increases should be what triggers NSR liability. While the United States does not believe that actual pollution increases are the *only* basis for triggering NSR, a view affirmed by the Sixth Circuit, actual increases resulting from a construction project do suffice to trigger NSR liability. This is an important way in which the new claims differ from the original Monroe Unit 2 claims, for which there was no post-project actual pollution increase.

C. DTE's Attempts to Obscure Its Pollution Increases

Despite projected and actual pollution increases, DTE did not obtain NSR permits for the projects at issue. Instead, the company submitted misleading information to state regulators to hide the increases. Two examples are provided below. These are just examples; there are similar factual scenarios for the other new claims. The examples below both relate to DTE's selection of the baseline period for projects. Notably, the Sixth Circuit explicitly flagged selection of an improper baseline as an example of a situation where EPA enforcement would be appropriate. *DTE Energy*, 711 F.3d at 650 ("EPA must be able to prevent construction if an operator, for example, uses an improper baseline period. . .").

Using An Impermissible Baseline Period Before The Project

In Fall 2007, DTE performed a major project at Belle River Unit 2 that involved replacing significant portions of the boiler. Att. 3 (September 19, 2007 Letter, W. Rugenstein to W. Presson) at 4. In notifying state regulators of the project, DTE correctly explained that the rules required a comparison of "baseline actual emissions" and "projected actual emissions." *Id.* at 1 (citing 40 C.F.R. § 52.21(a)(2(iv)(c) and (b)(48)). However, DTE failed to note that the definition of baseline emissions requires that the baseline be selected from "within the 5-year period immediately preceding when the owner or operator begins actual construction of the project." 40 C.F.R. § 52.21 (b)(48)(i).[3] Rather than use a baseline from the five-year-period required by the regulations, DTE selected a baseline from January 2000 to December 2001 – a period that began more than seven years before the project.

Using An Impermissible Baseline Period After The Project

In Spring 2007, DTE performed a major project at Trenton Channel Unit 9 that included replacing the economizer, one of the major components of the boiler. Att. 4 ((March 6, 2007 Letter, W. Rugenstein to L. Fiedler) at 4. In notifying State regulators of the project, DTE reported that it expected pollution to increase, but claimed that those projected increases were not related to the work. *Id.* at 2. In providing notice to the State, DTE used the calendar years 2005 and 2006 as the baseline period for its emissions calculations. *Id.* at 5. DTE proceeded with the project, and pollution actually did increase. Comparing the baseline DTE used before the project with DTE's reported emissions after the project, pollution increased by 443 tons of SO_2 and 138 tons of NO_X per year. Att. 4 at 5; Att. 5 (February 26, 2010 Letter, K. Guertin to T. Seidel) at 2-3, 5.

[3] A period outside the preceding five years may only be used with the agreement of EPA or the state regulating agency. 40 C.F.R. § 52.21 (b)(48)(i).

Rather than acknowledge the increase and either (a) get an NSR permit or (b) explain to the State regulators why DTE believed no permit was required, DTE decided to hide the increase. When DTE reported its 2009 pollution totals to the State, it *changed its baseline period* to select a period with higher pollution that avoided showing an increase. Ex. 5 (2009 Trenton Channel Power Plant Emissions Report) at 2-3, 5. For its new baseline period, DTE selected separate periods for SO_2 and NO_X, but both covered time periods *after* the project. Thus instead of reporting a comparison of pollution before and after the project, DTE presented a comparison of pollution immediately after the project to pollution later in time. Such a comparison has no basis in the NSR rules, which specifically require the baseline to be within the five years *before* a project. 40 C.F.R. § 52.21(b)(48)(i). If the baseline period comes *after* the project begins, there is no longer the comparison of pre-construction and post-construction pollution required by the law.

ARGUMENT

I. Legal Standard For Amending Complaint

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint should be "freely" given "when justice so requires." Fed. R. Civ. P. 15(a)(2); *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986). The Supreme Court has held that the "freely given" standard of Rule 15(a) should be applied by district courts so that claims are resolved on the merits rather than on technicalities of pleading. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982).

The *Foman* Court established that "where the underlying facts would support a claim, leave to amend should be granted" unless certain factors, now called the "*Foman* factors," compelled denial of the motion. The *Foman* factors are: "undue delay, bad faith or dilatory

motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." *Foman*, 371 U.S. at 182. In applying the factors, a court "must find at least some significant showing of prejudice to the opponent" to deny a motion to amend a complaint. *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (quoting *Moore*, 790 F.2d at 562); *see also Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973) ("guidelines are founded on the hornbook proposition that piecemeal litigation should be discouraged").

The Sixth Circuit generally construes Rule 15 liberally. *See Moore*, 790 F.2d at 562 ("In light of the authority in this Circuit . . . indicating a requirement of at least some significant showing of prejudice to the opponent and manifesting liberality in allowing amendments to a complaint, we conclude that the denial of plaintiff's motion here to amend was an abuse of discretion"); *Tefft*, 689 F.2d at 639 (holding that cases "should be tried on their merits rather than the technicalities of pleadings").

II. Granting Leave To Amend The Complaint Is Appropriate Here

A. Amending the Complaint Now Will Result in the Most Efficient Resolution of the Claims between the Parties

Now that the case is back before the Court and the United States is prepared to bring its additional claims, the most efficient way to proceed is to amend the complaint, conduct whatever additional discovery is necessary, and resolve all the United States' claims together. The Sixth Circuit has described Rule 15(a) and *Foman* as "founded on the hornbook proposition that piecemeal litigation should be discouraged, not only because it is antagonistic to the goals of public policy, but also because it is prejudicial to the rights of individual litigants." *Troxel Mfg.*, 489 F.2d at 970.

There is no reason here to separate the new claims from the existing Monroe Unit 2 claims. First, even if the motion for leave to amend is denied, the Government could still bring the new claims in a separate action. For many of the claims, the statute of limitations has not yet run. For the remainder, because NSR is a continuing violation under Sixth Circuit precedent, each day is a new violation of the law. *See Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 419 (6th Cir. 2007). In either case, the new claims could be brought in a separate complaint. Thus the only question is whether it is best to resolve all the claims together or in a piecemeal fashion.

Second, there will be overlap between the original claims and the new claims. Some of the documents and testimony relevant to the original claims will also be relevant to the new claims. Separating the claims into two trials would be inefficient for the Court and the Parties.

B. None of the *Foman* Factors Support Denying Leave to Amend the Complaint

Of the *Foman* factors, "notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted." *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973). None of the factors support denying leave to amend in this case.

1. The Amended Complaint does not prejudice DTE

The "party opposing a motion to amend must make some significant showing of prejudice to prevail." *Sec. Ins. Co. of Hartford v. Kevin Tucker & Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995). There is no significant prejudice here. Adding the new claims will require additional discovery, and that discovery may be inconvenient to DTE. However, such inconveniences do not rise to the level of prejudice that would warrant denial of a leave to amend. *See Johnson v. Ventra Group, Inc.*, No. 96-1463, 1997 WL 468332, at *3 (6th Cir. Aug. 13,

1997) (allowing party to amend complaint even though the amendment would require an extension of time for additional discovery where discovery had been closed and where the other party would need to defend against additional causes of action).

Moreover, whatever inconvenience to DTE would be the same if the motion for leave to amend was denied and the United States' new claims were brought in a separate action. Indeed, merging the existing Monroe Unit 2 claims with the new claims will streamline the litigation as compared to having the two cases proceed on separate tracks, minimizing the overall burden on DTE and the Court. Reopening discovery and then hearing the merits of all the claims together will provide the most efficient way to resolve the dispute between the Parties on NSR applicability.

There is some Sixth Circuit precedent upholding findings of prejudice sufficient to deny an amended complaint where allowing the new complaint would require reopening discovery. *See, e.g.*, *Moore*, 790 F.2d at 560. Importantly, however, other Sixth Circuit cases find that reopening discovery does not compel denying a motion to amend. *See, e.g., See Johnson*, 1997 WL 468332, at *3. The circumstances here show there is no prejudice. First, under the facts of *Moore*, the amended charge "was not contemplated by the original complaint." Here the United States made clear from the outset of the case that additional claims were possible. Second, discovery on the Monroe Unit 2 claims was expedited at the suggestion of the Court, a proposal agreed to by the Parties with the knowledge that other claims would likely follow. Finally, there is no schedule yet for the resolution of the original claim, and the Parties and the Court can set a schedule that includes sufficient time for discovery for both sides. This avoids the potential prejudice of amending after the close of discovery – that the defending party would not have time to prepare its defense. *See Estes v. Kentucky Utils. Co.*, 636 F.2d 1131, 1134 (6th Cir.

1980) (citation omitted) ("[P]rejudice is demonstrated when a party has insufficient time to conduct discovery on a new issue raised in an untimely manner. Allowance of the amendment would then force that party to go to trial without adequate preparation on the new issue.").

2. DTE has had ample notice of the claims in the Amended Complaint

As described above, DTE was on notice that EPA had additional NSR claims from July of 2009, and the United States has made clear from the outset of the litigation that it might seek to amend the complaint and bring further claims. This clear notice to DTE made before the litigation commenced mitigates any potential prejudice.

3. There is no undue delay in the United States' Amended Complaint

There is no undue delay here. These claims were not brought in the initial complaint because the United States sought to require DTE to begin the process of installing controls at Monroe Unit 2. As described above, the United States was open with DTE and the Court from the beginning of this litigation that further claims would likely follow. Now that the controls at Monroe Unit 2 are nearly complete and the original claims are back before this Court after appeal, the time is ripe for adding the remaining claims.

The Sixth Circuit has established that "delay alone, regardless of its length is not enough to bar" amendment of a complaint. *Duggins.*, 195 F.3d at 834 (*quoting Moore*, 790 F.2d at 560). Instead, the opposing party must show an intent to harass or "at least some significant showing of prejudice . . . ." *Moore*, 790 F.2d at 561-62. This Court then "'weigh[s] the cause shown for the delay against the resulting prejudice to the opposing party.'" *Belle v. Ross Prods. Div.*, No. 2:01-CV-677, 2003 WL 133242, at *3 (S.D. Ohio Jan. 3, 2003) (*citing Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 873 (6th Cir. 1973)). There is no prejudice or intent to harass here. The United States was open about its plans from the beginning, and the delay in bringing the

additional claims was the result of a plan devised by the Court and the Parties with the knowledge that additional claims would likely follow. Amending the complaint now to resolve all claims together is the most efficient way to proceed.

4. The Amended Complaint is not futile

The claims in the Amended Complaint are not futile. Each claim is well grounded in the law and in the facts developed so far. The Sixth Circuit has made clear that there are two ways to trigger NSR:

1. A source triggers if it should project an increase before the project. *DTE Energy*, 711 F.3d at 647 (regulations require source to get permit and install modern pollution-control technology where projected emissions are greater than baseline emissions);

2. A source triggers if actual pollution shows an increase after the project. *Id.* at 651.

In either case, EPA can enforce and require the source to obtain a permit and install pollution controls if necessary. *Id.* at 647, 651, 652. We expect that the facts will show that the new claims trigger NSR under both the pre-construction and actual pollution tests.

Notably, the new claims in the Amended Complaint would succeed even under DTE's (incorrect) view of NSR. DTE has long argued that whether pollution actually increases after the project should control liability. For the new claims, we anticipate that the facts will show actual increases in pollution. For liability based on pre-construction projections, DTE can no longer argue that no such liability exists after the Sixth Circuit decision. The decision states clearly that an operator who fails to follow the pre-construction requirements "is subject to an enforcement proceeding." *Id.* at 649. Faced with a clear statement of EPA's enforcement authority, DTE now tries to argue that EPA's authority is limited to certain kinds of deviations from the rules. *See, e.g.*, ECF 183 at 2. This claim too is incorrect, but the additional claims meet even DTE's unduly restrictive standard. DTE says that liability based on a source's faulty pre-construction

analysis is limited to situations such as using an improper baseline. ECF 183 at 2. Here, the facts will show that DTE indeed relied upon improper baselines. The new claims thus are not susceptible to the DTE summary judgment motion that is currently before the Court.

CONCLUSION

The United States respectfully seeks leave to add claims related to six additional projects in the Amended Complaint. Amending the complaint and proceeding to resolution on the new claims and the original Monroe Unit 2 claim at the same time is the most efficient way to resolve the issues between the United States and DTE.

Respectfully Submitted,

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Dated: September 3, 2013

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading and supporting materials were served via ECF on counsel of record.

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LIST OF ATTACHMENTS

1. Proposed Amended Complaint
2. Excerpts of Preliminary Injunction Transcript
3. September 19, 2007 Letter, W. Rugenstein to W. Presson
4. March 6, 2007 Letter, W. Rugenstein to L. Fiedler
5. February 26, 2010 Letter, K. Guertin to T. Seidel

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UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT:

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

FIRST AMENDED COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges:

NATURE OF THE ACTION

1. This is a civil action brought against DTE Energy Co. and Detroit Edison Co. (collectively "Defendants" or "DTE") for violations of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, at the Belle River Power Plant in East China, Michigan, the Monroe Power Plant in Monroe, Michigan, and the Trenton Channel Power Plant in Trenton, Michigan. Pursuant to Sections 113(b) and 167 of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7413(b) and 7477, the United States seeks injunctive relief and the assessment of civil penalties for violations of: (a) the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. §§ 7470-7492; (b) the nonattainment New Source Review ("Nonattainment NSR") provisions of the Act, 42 U.S.C. §§ 7501-7515; (c) applicable federal PSD and Nonattainment NSR regulations;

and (d) the State Implementation Plan ("SIP") adopted by the State of Michigan and approved by EPA pursuant to Section 110 of the Act, 42 U.S.C. § 7410.

2. At various times, Defendants performed major modifications at Belle River Units 1-2, Monroe Units 1-3, and Trenton Channel Unit 9 (collectively "Modified Units"). Defendants failed to obtain the required permits for these multi-million dollar modifications. Defendants also failed to install and operate the best available control technology ("BACT") or lowest achievable emissions rate ("LAER") to control emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"), as required by the Act.

3. As a result of Defendants' operation of the Modified Units following the unlawful modifications, thousands of tons of SO_2, NO_x, and related pollution have been and continue to be released into the atmosphere. SO_2 and NO_x can combine with other elements in the air to form tiny particulate matter (known as $PM_{2.5}$ because the particles are smaller than 2.5 microns in size). These pollutants cause harm to human health and the environment once emitted into the air, including premature death, heart attacks, respiratory problems, and adverse environmental effects.

JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to Sections 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

5. Venue is proper in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the violations occurred and are occurring in this District, the facilities at issue are operated by Defendants in this District, and Defendants reside in this District.

NOTICES

6. EPA issued Defendants Notices of Violation on July 24, 2009, June 4, 2010, and March 13, 2013. EPA provided copies of these Notices to the State of Michigan, as required by Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1).

7. The United States provided actual notice of the commencement of this action to the State of Michigan and will provide actual notice of the amendment of the complaint, as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

8. The 30-day period established in 42 U.S.C. § 7413 between issuance of the Notices of Violation and commencement of this action has elapsed.

AUTHORITY

9. Authority to bring this action is vested in the Attorney General of the United States by CAA Section 305, 42 U.S.C. § 7605, and pursuant to 28 U.S.C. §§ 516 and 519.

THE DEFENDANTS

10. Defendant DTE Energy Co. is a Michigan corporation with its principal place of business at One Energy Plaza, Detroit, Michigan. Defendant Detroit Edison Co, on information and belief now known as DTE Electric Co., is a Michigan corporation with the same place of business as DTE Energy Co. Detroit Edison Co. is a wholly-owned subsidiary of DTE Energy Co.

11. Defendant Detroit Edison Co. owns and operates the Belle River Power Plant, Monroe Power Plant, and Trenton Channel Power Plant (collectively "Complaint Plants"). Upon information and belief, DTE Energy Co. is an operator of the Complaint Plants, because, among other things, DTE Energy Co. employees make decisions involving construction and environmental matters at the plants. In addition, as Detroit Edison's parent company, DTE

Energy Co. must approve major capital expenditures at the Complaint Plants, such as the installation of pollution controls or the modification work at issue here.

12. Each Defendant is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

STATUTORY AND REGULATORY BACKGROUND

13. The Clean Air Act is designed to protect and enhance the quality of the nation's air to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

14. As described below, the Clean Air Act and its regulations include both a PSD program for areas in attainment with air quality standards and a Nonattainment NSR program for areas out of attainment with air quality standards. Together, these programs are referred to as New Source Review or NSR.

National Ambient Air Quality Standards

15. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for those air pollutants ("criteria pollutants") for which air quality criteria have been issued pursuant to Section 108 of the Act, 42 U.S.C. § 7408. The primary NAAQS are to be adequate to protect the public health with an adequate margin of safety, and the secondary NAAQS are to be adequate to protect the public welfare from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

16. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the

NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an "attainment" area. An area that does not meet the NAAQS is a "nonattainment" area. An area that cannot be classified due to insufficient data is "unclassifiable."

17. Defendants' Belle River Power Plant is located in St. Clair County, Michigan. At all times relevant to this Complaint, St. Clair County has been classified as in attainment or unclassifiable for SO_2 and NO_X, among other pollutants. From April 5, 2005 to the present, St. Clair County has been classified as nonattainment for $PM_{2.5}$. From June 15, 2004 to June 29, 2009, St. Clair County was classified as nonattainment for ozone.

18. Defendants' Monroe Power Plant is located in Monroe County, Michigan. At all times relevant to this Complaint, Monroe County has been classified as in attainment or unclassifiable for SO_2 and NO_X, among other pollutants. From April 5, 2005 to the present, Monroe County has been classified as nonattainment for $PM_{2.5}$. From June 15, 2004 to June 29, 2009, Monroe County was classified as nonattainment for ozone.

19. Defendants' Trenton Channel Power Plant is located in Wayne County, Michigan. At all times relevant to this Complaint, Wayne County has been classified as in attainment or unclassifiable for SO_2 and NO_X, among other pollutants. From April 5, 2005 to the present, Wayne County has been classified as nonattainment for $PM_{2.5}$. From April 15, 1991 to September 4, 1996, the portion of Wayne County in which Trenton Channel is located was classified as nonattainment for PM10. From 1978 until April 6, 1995 and from June 15, 2004 to June 29, 2009, Wayne County was classified as nonattainment for ozone.

20. Pursuant to 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a SIP that provides for the attainment, maintenance, and enforcement of the NAAQS.

Under Section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), each SIP must include a permit program to regulate the modification and construction of any stationary source of air pollution as necessary to assure that NAAQS are achieved.

Prevention of Significant Deterioration Requirements

21. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to herein as the "PSD program."

22. Pursuant to CAA Section 110, 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a SIP that includes, among other things, regulations to prevent the significant deterioration of air quality under CAA Sections 161-165, 42 U.S.C. §§ 7471-7475.

23. Upon EPA approval, state SIP requirements are federally enforceable under CAA Section 113, 42 U.S.C. §§ 7413(a), (b); 40 C.F.R. § 52.23.

24. A state may comply with Section 161 of the Act by having its own PSD regulations approved by EPA as part of its SIP, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166.

25. If a state does not have a PSD program that has been approved by EPA and incorporated into the SIP, the federal PSD regulations set forth at 40 C.F.R. § 52.21 shall be incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).[1]

26. On August 7, 1980, EPA incorporated 40 C.F.R. § 52.21(b)-(w) by reference into the Michigan SIP. 45 Fed. Reg. 52,741. From that time until September 16, 2008, the federal PSD regulations at 40 C.F.R. § 52.21 governed PSD in Michigan. On September 16, 2008, EPA conditionally approved Michigan's PSD SIP provisions. 73 Fed. Reg. 53,366. On March 25, 2010, EPA fully approved Michigan's PSD SIP provisions. 75 Fed. Reg. 14,352. The Michigan PSD SIP provisions are codified at Michigan Admin. Code R. 336.2801 *et. seq*. The Michigan SIP adopts by reference several sets of EPA regulations, including 40 C.F.R. § 52.21. Mich. Admin. Code R. 336.2801a.

27. Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the construction and operation of a "major emitting facility" in an attainment area unless a permit has been issued that comports with the requirements of Section 165 and the facility employs BACT for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(1) of the Act, 42 U.S.C. § 7479(1), designates fossil fuel fired steam electric plants of more than two hundred and fifty million British thermal units ("BTUs") per hour heat input and that emit or have the potential to emit one hundred tons per year or more of any regulated pollutant to be "major emitting facilities." Under the PSD program, a "major stationary source" is defined to include fossil fueled steam electric generating plants of more than 250 million

[1] There are several sets of federal regulations that apply to different aspects of the NSR program. In addition, the state regulations apply in some circumstances, while in other circumstances earlier versions of the federal rules applied at the time of the modification. The substance of the provisions is generally the same across the different regulations. In general, this Complaint cites to 40 C.F.R. § 52.21 for convenience.

BTUs per hour heat input that emit, or have the potential to emit, one hundred tons per year or more of any regulated air pollutant. 40 C.F.R. § 51.166(b)(1)(i)(a).

28. Section 169(2)(c) of the Act, 42 U.S.C. § 7479(2)(C), defines "construction" as including "modification" (as defined in Section 111(a) of the Act). "Modification" is defined in Section 111(a) of the Act, 42 U.S.C. § 7411(a)(4), to be "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

29. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2)(i) as "any physical change in or change in method of operation of a major stationary source that would result in" a significant emissions increase and a significant net emissions increase of a regulated pollutant.

30. A "significant emissions increase" occurs when the difference between "baseline actual emissions" before the physical change, as defined by 40 C.F.R. § 52.21(b)(48)(i), and "projected actual emissions" for the period after the physical change, as defined by 40 C.F.R. § 52.21(b)(41), exceeds the significance threshold for the pollutant at issue. 40 C.F.R. § 52.21(a)(2)(iv)(c). A "net emissions increase" is the difference between the emissions increase calculated as required by 40 C.F.R. § 52.21(a)(2)(iv)(c) and any other increases or decreases allowed in the netting process under 40 C.F.R. § 52.21(b)(3). Such an increase is "significant" if it exceeds the significance threshold for the pollutant at issue. The relevant significance thresholds in this case are: 40 tons per year of SO_2; 40 tons per year of NO_X; and 25 tons per year of PM. 40 C.F.R. § 52.21(b)(23)(i). Effective July 15, 2008, SO_2 is regulated as a precursor to $PM_{2.5}$. 73 Fed. Reg. 28321, 28327-28 (May 16, 2008).

31. A "major modification" also occurs where actual emissions data after the completion of the physical change shows a net emissions increase and a significant net emissions increase. 40 C.F.R. § 52.21(a)(2)(iv)(b); 57 Fed. Reg. 32,314, 32,325.

32. As set forth at 42 U.S.C. § 7475(a)(4) and 40 C.F.R. § 52.21(j), a source with a major modification in an attainment or unclassifiable area must install and operate BACT, as defined in 42 U.S.C. § 7479(3) and 40 C.F.R. § 52.21(b)(12), where the modification would result in a significant net emissions increase of a pollutant subject to regulation under the Act. 42 U.S.C. § 7475(a)(4); Mich. Admin. Code R. 336.2802(3), 336.2810.

33. The relevant law defines BACT, in pertinent part, as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . ." Section 169(3) of the Act, 42 U.S.C. § 7479(3); Mich. Admin. Code Rule 336.2801(f).

Nonattainment New Source Review Requirements

34. Part D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, sets forth provisions for New Source Review requirements for areas designated as nonattainment for purposes of meeting the NAAQS standards. These provisions are referred to herein as "Nonattainment NSR." The Nonattainment NSR program is intended to reduce emissions of air pollutants in areas that have not met the NAAQS so that the areas make progress towards meeting the NAAQS.

35. Under Section 172(c)(5) of the Nonattainment NSR provisions of the CAA, 42 U.S.C. § 7502(c)(5), a state is required to adopt Nonattainment NSR SIP rules that include provisions that require that all permits for the construction and operation of modified major

stationary sources within nonattainment areas conform to the requirements of Section 173 of the CAA, 42 U.S.C. § 7503. Section 173 of the CAA, in turn, sets forth a series of requirements for the issuance of permits for major modifications to major stationary sources within nonattainment areas. 42 U.S.C. § 7503.

36. By rule, EPA regulates SO_2 as a precursor to $PM_{2.5}$. 73 Fed. Reg. 28321 (May 16, 2008). Until EPA approves Michigan SIP provisions related to $PM_{2.5}$, 40 C.F.R. § 51 Appendix S applies to areas of $PM_{2.5}$ nonattainment. 73 Fed. Reg. 28321, 28343 (May 16, 2008). Michigan has submitted for EPA's review and approval revised Nonattainment NSR provisions that include regulation of $PM_{2.5}$ precursors. If those provisions are approved, they will become federally enforceable at that time. 42 U.S.C. §§ 7413(a), (b); 40 C.F.R. § 52.23.

37. From April 5, 2005 through the present, the Belle River, Monroe, and Trenton Channel power plants have been located in areas designated as non-attainment for $PM_{2.5}$. 70 Fed. Reg. 944.

38. Section 173 of the Act, 42 U.S.C. § 7503, 40 C.F.R. § 51 Appendix S, and Mich. Admin. Code R. 336.2908 provide that construction and operating permits for a major modification in a nonattainment area may only be issued if, *inter alia*, (a) sufficient offsetting emission reductions have been obtained to reduce existing emissions to the point where reasonable further progress towards meeting the NAAQS is made; and (b) the pollution controls to be employed will reduce emissions to the lowest achievable emission rate.

39. "Major modification" is defined in 40 C.F.R. § 51 Appendix S and Mich. Admin. Code R. 336.2901(s) as any physical change or change in the method of operation that results in both a significant increase and a significant net increase of a regulated NSR pollutant from a major stationary source.

40. "Net emissions increase" means the amount by which the sum of the following exceeds zero: (a) any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and (b) any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable as calculated under the applicable rules. 40 C.F.R. § 51 Appendix S; Mich. Admin. Code R. 336.2901(v). A "significant" net emissions increase means an increase in the rate of emissions that would equal or exceed any of the following rates for the following pollutants: 40 tons per year of SO_2; 40 tons per year of NO_X; and 25 tons per year of PM. 40 C.F.R. § 51 Appendix S; Mich. Admin. Code R. 336.2901(gg).

41. A "major modification" also occurs where actual emissions data after the completion of the physical change shows a net emissions increase and a significant net emissions increase. 40 C.F.R. § 51 Appendix S(IV)(I)(1); 57 Fed. Reg. 32,314, 32,325.

42. The relevant law defines LAER, in pertinent part, as "the most stringent emissions limitation which is contained in [any SIP] for such class or category of sources, unless . . . the proposed source demonstrates that such limitations are not achievable, or . . . which is achieved in practice by such class or category of source, whichever is more stringent." 42 U.S.C. § 7501(3); Mich. Admin. Code Rule 336.2901(r).

43. Though Nonattainment NSR is a preconstruction permitting program, the Clean Air Act, the implementing regulations, and the Michigan Nonattainment NSR rules establish requirements for the lawful operation of the source following a modification.

New Source Review Recordkeeping and Reporting Requirements

44. The federal regulations and Michigan SIP require sources to assess NSR applicability before undergoing a physical or operational change, and maintain and report certain information where there is a "reasonable possibility" that a change may qualify as a major modification. 40 C.F.R. § 52.21(r)(6); Mich. Admin. Code R. 336.2818(3). Under the rules, a reasonable possibility exists where the projected emissions increase – though below the significance level for immediately triggering NSR – is at least 50% of the significance level (without accounting for the ability to exclude certain aspects of the emissions increase). 40 C.F.R. § 52.21(r)(6)(vi); Mich. Admin. Code R. 336.2818(3)(f). For an electric utility, where there is such a reasonable possibility that the project will trigger NSR, the source is required to maintain information related to its preconstruction analysis, including the basis for any emissions excluded from the calculated emissions increase. 40 C.F.R. § 52.21(r)(6)(i); Mich. Admin. Code R. 336.2818(3)(a), 336.2902(6)(a). After any project for which there is a "reasonable possibility" of qualifying as a major modification, sources must monitor their pollution and sources like those at issue here must report those emissions to the relevant permitting authority. 40 C.F.R. § 52.21(r)(6)(iii)-(iv); Mich. Admin. Code R. 336.2818(3)(a), 336.2902(6)(a). If such actual post-change emissions data shows a net emissions increase and a significant net emissions increase, NSR is triggered notwithstanding the original projection. 40 C.F.R. § 52.21(a)(2)(iv)(b); 57 Fed. Reg. 32,314, 32,325.

ENFORCEMENT PROVISIONS

45. Sections 113(a)(1) and (3) of the Act, 42 U.S.C. § 7413(a)(1) and (3), provide that the Administrator may bring a civil action in accordance with Section 113(b) of the Act whenever, on the basis of any information available, the Administrator finds that any person has violated or is in violation of any other requirement or prohibition of, *inter alia*, the PSD, Nonattainment NSR, or Title V requirements of the Act, or any rule or permit issued thereunder; or the provisions of any approved SIP or any permit issued thereunder.

46. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes EPA to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to $25,000 per day for each violation occurring on or before January 30, 1997; up to $27,500 per day for each such violation occurring on or after January 31, 1997 and up to and including March 15, 2004; up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4, whenever such person has violated, or is in violation of, *inter alia,* the requirements or prohibitions described in the preceding paragraph.

47. 40 C.F.R. § 52.23 provides, *inter alia*, that any failure by a person to comply with any provision of 40 C.F.R. Part 52, or with any approved regulatory provision of a SIP, shall render such person in violation of the applicable SIP, and subject to enforcement action pursuant to Section 113 of the Act, 42 U.S.C. §7413.

48. Section 167 of the Act, 42 U.S.C. § 7477, authorizes EPA to initiate an action for injunctive relief as necessary to prevent the construction, modification, or operation of a major emitting facility which does not conform to the PSD requirements in Part C of Title I of the Act.

DEFENDANTS' POWER PLANTS

Belle River Power Plant

49. The Belle River Power Plant consists of two units of approximately 670 MW (gross) each that began operating in 1984 and 1985. The plant is located in East China, Michigan, on the shore of the Belle River and approximately 50 miles northeast of Detroit.

50. Both Belle River Units 1 and 2 are electric steam generating units as that term is used in the Act and the Michigan SIP.

Monroe Power Plant

51. The Monroe Power Plant consists of four units of about 820 MW (gross) each that began operating in the early 1970s. The plant is located in Monroe, Michigan, on the western shore of Lake Erie and approximately 40 miles southwest of Detroit.

52. Each of Monroe Units 1-4 is an electric steam generating unit as that term is used in the Act and the Michigan SIP.

Trenton Channel Power Plant

53. The Trenton Channel Power Plant has five boiler units: four small units of about 60 MW each and one larger unit of about 540 MW (gross). The smaller units are known as units 16-19 and began operation in 1949 and 1950. The larger unit is known as Trenton Channel 9 and began operation in 1968. The plant is located in Trenton, Michigan, next to Slocum's Island in the Detroit River and about 20 miles southwest of Detroit.

54. Each of the Trenton Channel Units 9 and 16 through 19 is an electric steam generating unit as that term is used in the Act and the Michigan SIP.

Pollution

55. Based on data reported by Defendants to EPA, each of the Modified Units is one of the largest sources of air pollution in the state of Michigan.

56. The Modified Units reported the following SO_2 emissions in 2011 and 2012:

Complaint Unit	2011 SO_2 emissions	2012 SO_2 emissions	Ranked in 2012 Top 10 of Michigan SO_2 Sources
Belle River 1	10,845	13,127	4
Belle River 2	14,988	11,741	6
Monroe 1	23,831	25,267	1
Monroe 2	23,719	22,859	2
Monroe 3	956	619	**
Trenton Channel 9	16,421	16,999	3

57. The Modified Units reported the following NO_X emissions in 2011 and 2012:

Complaint Unit	2011 NO_X emissions	2012 NO_X emissions	Ranked in 2012 Top 10 of Michigan NO_X Sources
Belle River 1	3,594	4,731	3
Belle River 2	5,093	3,694	4
Monroe 1	5,751	5,234	2
Monroe 2	6,494	5,393	1
Monroe 3	1,078	1,476	10
Trenton Channel 9	2,453	2,442	6

GENERAL ALLEGATIONS

58. At all times relevant to this Amended Complaint, Defendants were the owners and/or operators of the Complaint Plants and continue to be the owners and/or operators of the Complaint Plants.

59. At all times relevant to this Amended Complaint, each of the Complaint Plants has had the potential to emit more than 100 tons per year of pollutants subject to regulation under the Act, including, but not limited to, NO_X and SO_2.

60. At all times relevant to this Amended Complaint, each of the Complaint Plants was and is a fossil-fuel-fired steam electric plant of more than 250 million British thermal units (BTU) per hour heat input.

61. At all times relevant to this civil action, each of the Complaint Plants and each of the Modified Units individually was a "major emitting facility" and a "major stationary source," within the meaning of the Act and the Michigan SIP for NO_X, SO_2, and PM.

62. Each of the Modified Units is a coal-fired electric generating unit. Coal-fired units include boilers that burn coal to generate heat that converts water into steam. Hot gases from burning coal flow through duct work and pass across a series of major components in the unit, which heat water into steam and ultimately pass the high-temperature, high-pressure steam through steel tubes in the components to turbines that spin a generator to produce electricity. The tubes in the boiler are grouped into boiler tube components, which consist of massive arrays of large steel tubes. Combustion gas exiting the boiler is used to preheat the air entering the boiler through the use of an air preheater, a series of enormous baskets with corrugated metal heat exchanging surface. The air preheater and boiler tube components can weigh many tons and cost millions of dollars to replace. Major components of a coal-fired boiler include the superheater,

economizer, reheater, waterwalls, coal burners, and air heaters, among others. When a major component in a coal-fired electric generating unit breaks down, such as one of the components replaced by Defendants, it causes the unit to be taken out of service for repairs – an event known as a "forced outage." A deteriorated major component can cause increasing numbers of forced outages, as well as maintenance and scheduled outages needed to maintain the worn-out equipment, preventing the unit from generating electricity when it is needed. By replacing the worn-out component that is causing the outages, a utility improves the unit's availability to operate more hours in a year. At the Modified Units, the newly available hours of operation enabled by the project would be expected to be used to generate electricity. These additional hours of operation translate into increased amounts of coal burned in the unit, and more annual pollution emitted from the unit's smokestack into the atmosphere.

63. In addition to improving the availability of a coal-fired generating unit, replacing deteriorated components with new, improved components can also increase the capacity of the boiler and the amount of coal burned, and pollution emitted, during each hour of the unit's operation. Even if a project does not increase the amount of coal burned per hour, an improved component can result in a unit being operated during more hours, which in turn can lead to increases in coal burned at the unit and NO_X, SO_2, and other pollutants emitted from the unit's smokestack on an annual basis.

FIRST CLAIM FOR RELIEF
(PSD Violations at Monroe Unit 1)

64. Paragraphs 1 through 63 are realleged and incorporated herein by reference.

65. From approximately March through April 2006, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Monroe Unit 1. The activities included but were not limited

to: replacement of the secondary superheater pendants, replacement of the reheater pendants, replacement of waterwalls, and upgrade of the electrostatic precipitator ("ESP"). These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notices of violation dated July 24, 2009 and March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated March 2, 2006. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Monroe Unit 1 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

66. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Monroe Unit 1. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

67. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

68. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

SECOND CLAIM FOR RELIEF
(PSD Violations at Monroe Unit 2)

69. Paragraphs 1 through 68 are realleged and incorporated herein by reference.

70. From approximately March through June 2010, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Monroe Unit 2. These major modifications included one or more physical changes and/or changes in the method of operation at Monroe Unit 2, including, but not limited to: replacement of the high temperature reheater, replacement of the economizer, replacement of the exciter, and replacement of waterwalls. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notices of violation dated June 4, 2010 and March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated March 12, 2010. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a

significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Monroe Unit 2 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

71. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Monroe Unit 2. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; and (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

72. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

73. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to $37,500 per day for each such violation occurring on or after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRD CLAIM FOR RELIEF

(Nonattainment NSR Violations at Monroe Unit 2)

74. Paragraphs 1 through 73 are realleged and incorporated herein by reference.

75. On or about March 13, 2010, Defendants commenced construction of a major modification, as defined by the Act, federal regulations, and the Michigan SIP, that included the overhaul work described above. This major modification included one or more physical changes or changes in the method of operation at Monroe Unit 2. This major modification resulted in a significant net emissions increase, as defined by the relevant NNSR regulations, of the pollutant SO_2. Under the applicable NNSR rules, Defendants are required to comply with NNSR for SO_2 because it is a precursor to $PM_{2.5}$, and Monroe County is in nonattainment for $PM_{2.5}$.

76. Defendants did not comply with the applicable Nonattainment NSR ("NNSR") requirements under the Act and the implementing regulations with respect to the major modification and subsequent operations at Monroe Unit 2. Among other things, Defendants: (i) undertook such major modifications without first obtaining a Nonattainment NSR permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a LAER determination in connection with the major modifications; (iii) undertook such major modifications without installing LAER for control of SO_2 emissions; (iv) failed to operate LAER for control of SO_2 emissions pursuant to a LAER determination; (v) failed to operate in compliance with LAER emission limitations; (vi) failed to obtain the required pollution offsets; and (vii) operated the unit after undergoing an unpermitted major modification; (viii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

77. Defendants have violated and continue to violate the Nonattainment NSR provisions of Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515, and the implementing regulations. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

78. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to $37,500, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FOURTH CLAIM FOR RELIEF
(PSD Violations at Monroe Unit 2)

79. Paragraphs 1 through 78 are realleged and incorporated herein by reference.

80. From approximately February through May 2005, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Monroe Unit 2. These major modifications included one or more physical changes and/or changes in the method of operation at Monroe Unit 2, including, but not limited to: replacement of the secondary superheater, replacement of reheater pendants, replacement of waterwalls, replacement/upgrade of the high and low pressure turbines, and upgrade of the electrostatic precipitator. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notices of violation dated July 24, 2009 and March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated February 7, 2005. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan

SIP, by enabling and causing Monroe Unit 2 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

81. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Monroe Unit 2. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

82. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

83. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties

Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

FIFTH CLAIM FOR RELIEF
(PSD Violations at Monroe Unit 3)

84. Paragraphs 1 through 83 are realleged and incorporated herein by reference.

85. From approximately January through June 2004, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Monroe Unit 3. These major modifications included one or more physical changes and/or changes in the method of operation at Monroe Unit 3, including, but not limited to: replacement of the secondary superheater, replacement of the air heater, replacement of reheater pendants, replacement of waterwalls, replacement/upgrade of the high and low pressure turbines, and upgrade of the electrostatic precipitator. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notices of violation dated July 24, 2009 and March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated January 21, 2004. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Monroe Unit 3 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

86. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Monroe Unit 3. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook

such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

87. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

88. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

SIXTH CLAIM FOR RELIEF
(PSD Violations at Belle River Unit 1)

89. Paragraphs 1 through 88 are realleged and incorporated herein by reference.

90. From approximately September through December 2008, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA,

federal regulations, and Michigan SIP, on Belle River Unit 1. These major modifications included one or more physical changes and/or changes in the method of operation at Belle River Unit 1, including, but not limited to: replacement of the distributed control system, replacement of waterwalls, replacement of burners, and replacement of static exciter. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notice of violation dated March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated September 11, 2008. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Belle River Unit 1 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

91. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Belle River Unit 1. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring

emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

92. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

93. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

SEVENTH CLAIM FOR RELIEF
(Nonattainment NSR Violations at Belle River Unit 1)

94. Paragraphs 1 through 93 are realleged and incorporated herein by reference.

95. From approximately September through December 2008, Defendants commenced construction of a major modification, as defined by the Act, federal regulations, and the Michigan SIP, that included the overhaul work described above. This major modification included one or more physical changes or changes in the method of operation at Belle River Unit 1. This major modification resulted in a significant net emissions increase, as defined by the relevant NNSR regulations, of the pollutant SO_2. Under the applicable NNSR rules, Defendants are required to comply with NNSR for SO_2 because it is a precursor to $PM_{2.5}$, and St. Clair County is in nonattainment for $PM_{2.5}$.

96. Defendants did not comply with the applicable Nonattainment NSR requirements under the Act and the implementing regulations with respect to the major modification at Belle River Unit 1. Among other things, Defendants: (i) undertook such major modifications without first obtaining a Nonattainment NSR permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a LAER determination in connection with the major modifications; (iii) undertook such major modifications without installing LAER for control of SO_2 emissions; (iv) failed to operate LAER for control of SO_2 emissions pursuant to a LAER determination; (v) failed to operate in compliance with LAER emission limitations; (vi) failed to obtain the required pollution offsets; (vii) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

97. Defendants have violated and continue to violate the Nonattainment NSR provisions of Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515, and the implementing regulations. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

98. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

EIGHTH CLAIM FOR RELIEF
(PSD Violations at Belle River Unit 2)

99. Paragraphs 1 through 98 are realleged and incorporated herein by reference.

100. From approximately October through December 2007, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Belle River Unit 2. These major modifications included one or more physical changes and/or changes in the method of operation at Belle River Unit 2, including, but not limited to: replacement of the secondary superheater, replacement of waterwalls, and replacement of burners. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notices of violation dated July 24, 2009 and March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated September 19, 2007. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Belle River Unit 2 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

101. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Belle River Unit 2. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2

emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

102. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

103. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

NINTH CLAIM FOR RELIEF
(PSD Violations at Trenton Channel Unit 9)

104. Paragraphs 1 through 103 are realleged and incorporated herein by reference.

105. From approximately March through May 2007, Defendants began actual construction and operation of one or more "major modifications," as defined in the CAA, federal regulations, and Michigan SIP, on Trenton Channel Unit 9. These major modifications included one or more physical changes and/or changes in the method of operation at Trenton Channel Unit 9, including, but not limited to: replacement of the economizer and replacement of

waterwalls. These activities involved physical changes and/or changes in the method of operation that constitute a single, multi-million dollar modification and/or multiple modifications as described in the notice of violation dated March 13, 2013 and in Defendants' outage notification letter to the Michigan Department of Environmental Quality dated March 6, 2007. These physical changes and/or changes in the method of operation should have been expected to and/or actually did result in a significant net emissions increase of NO_X and/or SO_2, as defined in the federal regulations and/or the Michigan SIP, by enabling and causing Trenton Channel Unit 9 to burn more coal and release greater amounts of NO_X and/or SO_2 into the atmosphere on an annual basis.

106. Defendants did not comply with the PSD requirements in the Act and the Michigan SIP with respect to the major modifications and subsequent operations at Trenton Channel Unit 9. Among other things, Defendants: (i) undertook such major modifications without first obtaining a PSD permit for the construction and operation of the modified unit; (ii) undertook such major modifications without undergoing a BACT determination in connection with the major modifications; (iii) undertook such major modifications without installing BACT for control of NO_X and/or SO_2 emissions; (iv) failed to operate BACT for control of NO_X and/or SO_2 emissions pursuant to a BACT determination; (v) failed to operate in compliance with BACT emission limitations, including limitations that are no less stringent than applicable standards under Section 111 of the CAA; (vi) operated the unit after undergoing an unpermitted major modification; and (vii) violated the applicable NSR regulations for projecting and/or monitoring emissions by using improper baseline periods in their analysis and/or submitting projections contradicted by Defendants' internal analyses.

107. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), the federal PSD regulations, and/or the Michigan SIP. Unless restrained by an order of this Court, these violations will continue.

108. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and/or a civil penalty of up to $32,500 per day for each such violation occurring on or after March 16, 2004 and up to and including January 12, 2009; and up to $37,500 per day for each such violation occurring on or after January 13, 2009 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and 40 C.F.R. § 19.4.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, the United States requests that this Court:

1. Permanently enjoin Defendants from operating Belle River Power Plant Units 1 and 2, Monroe Power Plant Units 1-3, and Trenton Channel Power Plant Unit 9, including the construction of future modifications, except in accordance with the Clean Air Act and any applicable regulatory requirements;

2. Order Defendants to apply for New Source Review permit(s) under Parts C and/or D of Title I of the Clean Air Act, as appropriate, that conform with the permitting requirements in effect at the time of the permitting action, for each pollutant in violation of the New Source Review requirements of the Clean Air Act;

3. Order Defendants to remedy their past violations by, among other things, requiring Defendants to install and operate the best available control technology or lowest

achievable emission rate, as appropriate, at the Modified Units, for each pollutant in violation of the New Source Review requirements of the Clean Air Act;

4. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above;

5. Assess a civil penalty against Defendants of up to $37,500 per day per violation;

6. Award Plaintiff its costs of this action; and,

7. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

Dated: August 27, 2013

ROBERT G. DREHER
Acting Assistant Attorney General
Environment & Natural Resources Division

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB Plaintiff-Intervenors v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT:

ATTACHMENT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

And **Civil Action No. 10-13101**

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND SIERRA CLUB,

Proposed Intervener-Plaintiffs,

-v-

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.
_____/

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, JANUARY 19TH, 2011

APPEARANCES:

For the Plaintiff: **Thomas A. Benson, Esq.**
Justin A. Savage, Esq.
Ellen Christensen, Assistant United States Attorney

APPEARANCES (CONTINUED)

For the Defendants:	**F. William Brownwell, Esq.** **Mark B. Bierbower, Esq.** **James W. Rubin, Esq.** **Michael J. Solo, Esq.** **Matthew J. Lund, Esq.**
ALSO IN APPEARANCE:	
For the Proposed Intervener-Plaintiffs:	**Nicholas Schroeck, Esq.**
Court Reporter:	Joan L. Morgan, CSR Official Court Reporter

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

I N D E X

PROCEEDINGS

W I T N E S S E S

control for just one source would be a major boom for air quality regulators in the Midwest.

Q Now, which particular day of modeling results are we looking at here, Mr. Chinkin, again?

A Well, this particular day is a summer day. It's August 17th, of 2005.

Q Now, are you saying, Mr. Chinkin, that the air quality impact on August 17th, 2010 or even August 17th, 2011 is going to be identical to the one you show here for the same day in 2005?

A No, I'm not saying that.

Q Can you explain why you're using it then, just generally.

A So, in general, we run these models in a historical sense to see what are the range of air quality impact that you get with a range of meteorological events. Summertime, we all know it's hot and humid in the Midwest. Wintertime, it's obvious not hot and humid outside right now. So you want to have a range of weather when you run a model so that in some future year this weather pattern may not happen exactly as on August 17th, 2010 or 2011, but it's going to be happening on an August summer day. It's a typical weather pattern in the summer. So we try to cover all those kinds of weather patterns.

Q Before we turn to look at this point in pictures what

does it mean when you have a darker color on this picture?
A So in this particular picture the darkest color, this kind of brown color, that's the highest concentration range, greater than a half microgram.

So as we go through the animations in a moment you'll see many of the days are in a yellow-orangish color, but also many of the days have many areas, large areas in red and brown.

So that's a sense of scale. When you start seeing the reds and browns you're into several tenths of a microgram, greater than a half of microgram.

All I'm trying to point out there will be several days where it's greater than a whole microgram. It might be a microgram and a half on some days.

Q Now, these pictures are found in animated form, Appendix F to your declaration. Are you sitting here today able to remember the handful of days you want to point out and why you want to point them out to the Court?

A I have a pretty good memory but I can't memorize those exactly.

MR. SAVAGE: With your Honor's permission, Mr. Chinkin has prepared a small sheet of summaries. I'd like to hand up to the Court.

THE COURT: Did you prepare this yourself?

THE WITNESS: Yes, I did.

THE COURT: And you went through your records in order to make a summary so you could testify?

THE WITNESS: That's correct.

THE COURT: He can use it.

You know, now is probably a good time to break for lunch, but more importantly -- and before we break for lunch, you know, I'm listening to the testimony and I think the testimony is important. I think it's compelling. But I think what we're doing today perhaps is a bit premature. I think we have such a substantial question as to the main issue and that is the likelihood of success. I mean, it's going to be the battle of the experts. I've read, you know, everything -- and I think weighing the public interest and listening to the testimony and reading it, you know, it's so compelling that I think why not confront the issue. You both have witnesses, why not try this case. I can try this case in 30 days, 60 days so that once we decide the issue and that's whether or not it comes within the statute if the Government prevails and this information is very important so I can attach a remedy. If the Government doesn't prevail then I think it's still important maybe to some extent but I think I have much of it in the exhibits to determine which we still do, I mean, even if the Government doesn't prevail there's still an issue, and we're going to have to, you know, talk about that. But I

can try this case very quickly. Tell me if I'm wrong. I mean, the parties have done their homework, you've got experts. One expert says it is, one expert says it isn't. I think it's going to be a question of fact for the trier of fact to determine. As I say in weighing the interest to the public, if we can do it in a very short period of time then, you know, especially in the winter, before summer, we can balance it.

So at lunch why don't you guys talk about that. As I say, I'm here and I have nothing to do. I also set aside Friday for this hearing in case it went on. But what I'm listening to goes to remedy. So why not just confront the issue. You guys tell me, you know, when you can try it. I'm looking at my schedule. I've got nothing but time especially in March. February is pretty tight. I put it as nothing but priority.

I don't believe anybody has requested a trial by jury, but if they do I have no problems with that especially in this case where there's already jury instructions. It's always the most difficult thing to start crafting jury instructions in these kind of cases, and I'm not suggesting these are the one we would use, but at least the exhibit number, I think it's number 9.

So at lunch, why don't you talk about that. As I say I think that's the solution, get the first issue tried

and these issues are very important for remedy. So talk about it at lunch. We'll reconvene at 2:00 o'clock, and go from there.

MR. BENSON: Yes, your Honor.

(Court recessed, 12:45 p.m.)

- - --

(Court reconvened, 2:00 p.m.)

THE COURT: You may continue.

MR. BENSON: Your Honor, the other side stepped out for a moment.

THE COURT: No problem. I'm here a couple minutes early. Sometimes it's better that I'm early or I can get stuck on the phone.

MR. RUBIN: I'm sorry, your Honor.

THE COURT: Not a problem.

Have you had a chance to discuss it between yourselves and between your clients?

MR. BENSON: We have your Honor. We've started that discussion anyway, and we've discussed it with the other side, and I think we're ready -- we speak for the United States in going forward and we haven't heard back from the defendants --

THE COURT: Do you want a little more time to discuss it together or do you want to talk about it here on the record, either way. We can talk about it off the

record, any way you want to do it. We can go back and talk about it in chambers, whatever way you think is the most productive.

MR. BROWNWELL: Your Honor, why don't we talk about it off the record and we tell you what our respective positions are at this point and can decide --

THE COURT: You want it off the record?

MR. BROWNWELL: Yes.

THE COURT: No problem.

Government?

MR. BENSON: That's fine.

You Honor, we appreciate the feedback we've gotten today and I think we're ready to go forward and try this on an expedited schedule. I think what probably makes the most sense for us we think maybe on the window of about 90 days from now I think we can do it. We're willing to work with the other side and work out whatever discovery is necessary in that interim. I think it makes sense to view it, and the Court can merge the preliminary and the permanent injunction in this case and continue this until that time. If the Court would prefer we don't need to go through the rest of the testimony now. We can just sort of take what we've heard so far and add the rest later.

THE COURT: Okay. My thought is, we first decide

the issue in terms of whether was it a major or was it modification. Once we do that, then I think this kind of testimony would be very relevant to determine which way, whatever way it came out in terms of remedy.

MR. BENSON: And that really makes sense, your Honor.

The one other thing we would suggest and we think it's important particularly as we continue farther and farther from the date in which we originally set the order, that Detroit Edison would abide by pre-project emissions levels. We would like to add a like a little specificity to that order. Right now I think it just says almost literally pre-project level.

As one of their experts said and you saw it in Mr. Chinkin's testimony they sort of -- one of their experts took February of 2010 as a benchmark for monthly emissions path and we can go ahead and use that instead of a monthly emissions path going forward as it were a little bit premature and the evidence would pass on the company based on what they've --

MR. BROWNWELL: Your Honor, first on the order issue, we feel the order that the Court has issued is perfectly appropriate. It's clear maintaining emissions at pre-project level, the daytime levels, they were based on Monroe, is a pre-project modification that are annual

emissions --

THE COURT: I'm not opposed to putting a date in there. Should there be an alleged violation we have a benchmark because I suspect if there should be that problem how I am going to determine what the benchmark is. So we can talk about whether it's February or what date it is in a second, but what do you think about the trial?

MR. BROWNWELL: What is important, your Honor, are annual emissions. Annual emissions are regulated under the New Source Review Program is what triggered modification.

As far as the trial goes Detroit Edison has been focused, of course, on preparing for this preliminary injunction hearing and have had only a very limited constrained period of time for its expert preparation, and expert reports. So Detroit Edison would have difficulty in getting ready for trial that soon if we want to supplement its expert reports and expert discovery and perhaps other discovery we thought we would need. The Government has had a lot of discovery against Detroit Edison because it was issuing administrative information under Section 114 of the Clean Air Act going back to earlier this year. So Detroit Edison would want sufficient time for discovery, experts' supplementation and expert discovery.

We also are not sure, your Honor, just how big this case is. They are talking about Monroe 2, but there's

this other outstanding motion of violations in July of 2009, August, 35 additional projects. If this - the Complaint would be amended to pick up additional projects as the Government suggested that it might be to get a preliminary injunction filed then it's a much different case.

THE COURT: Well, two things: Number one, for the Government, the only thing that is before me of what I've read and what I'm concerned with today is the original Complaint which is Monroe 2. Government, are we talking about Monroe 2 or are we talking about something else?

MR. BENSON: Your Honor, I think for the expedited trial we're talking about here, it would make sense to focus on Monroe 2 because as the Court knows we've got all the information for the most part together and I think if Mr. Brownwell -- if you guys think there might be some additional discovery, if they want to supplement expert reports in a reasonable time maybe we'll do the same if they do. We can figure out a way to work all that out I think. We probably like to come back before the Court in short order to hammer all that out. But if we want to go ahead on that and then the Government is still considering whether or not to bring additional claims I think those would go forward on a separate track.

THE COURT: Those I don't know anything about.

This one I think -- I feel fairly comfortable that in a reasonable period of time if we concentrate on Monroe 2 that we can try this case. If it goes to other things I can't deal with that now. As I've said, I've read it in relation to this.

In terms of preparation --

MR. BROWNWELL: Your Honor, let me suggest if I could that if the case is going to be limited to Monroe 2, it might make sense for additional discussions on the case management proposed order.

THE COURT: Well, I can do it today if we agree. We're going to sit down and hammer out a schedule. I have to know an end date first. I need to know whether it's 90 days, or 60 days or a 120 days, or it isn't then we can go back and we can talk about when reports are due and so forth.

Also, neither side as requested a jury and I have no problems if you want to a jury. If either side wants a jury you can have a jury trial. I don't know if you want one or don't want one. Government, I'm not sure what your position is. Again, it has nothing to do with timing. It has to more to do with scheduling in terms of when we get things done.

MR. BENSON: Your Honor, we are prepared to try it before the Court. We won't have to have a jury.

THE COURT: You won't hurt my feelings.

MR. BROWNWELL: Your Honor, we would like time to consult with our clients.

THE COURT: Absolutely. Okay. It's not going to change the dates. It doesn't make any difference to me.

In a way, I'll be very honest with you I find this case interesting and probably -- I think if we had a jury trial, you would probably have more community finality either way and it may make some sense just from -- you know, this is a major health issue. But just because it's a major health issue doesn't mean, you know -- it's up to you. Let's do it in a reasonable period of time because it won't change it.

You know, I think 90 days is not unreasonable, but certainly I need to check my schedule. I want to make sure if we set a date it's a good date.

MR. BROWNWELL: Your Honor, we would request more like a 120 days.

MR. BENSON: Your Honor, if I could respond to that, this case was filed in August. It's been pending for six months. I think this is something we can do in another 90 days as the Court has suggested.

THE COURT: I'll compromise. I'll split the difference. I want to see my schedule.

I'm looking at May 3rd, May 2nd. Does anybody

have a prepaid vacation or family event? I don't like to interfere with any of those.

MR. BENSON: As far as I know I don't see any problem on our side. I think that date is fine. I'm not sure how long this trial will be. Particularly if it's a jury trial they've taken up to two weeks.

THE COURT: I don't think it would take two weeks if it was a non-jury trial.

If you need some time during the trial if you need a day or something to take care of personal affairs or do something --

MR. BROWNWELL: Your Honor, I would ask for some leeway to confer with counsel and possibly witnesses.

THE COURT: Why don't we do this? Why don't we take a break. Why don't you confer. See if they want to make a decision today on a jury or not, I don't care. That's not going to affect anything today. What we'll do is also kind of confer in terms of a scheduling order. I don't see this case going away as to that issue on dispositive motions so I don't think there's going to be dispositive motions so we don't have to worry about that. It will be a battle of the experts. So what we're really talking about is scheduling, discovery and things of that nature.

Why don't we take about to 2:30, let you talk to

your clients and then we can do at the same time a scheduling order. I can tell you some of the things I like to do during discovery. We can talk about all that, okay?

At 2:30 we'll reconvene. Talk to your clients and your experts. And I'm going to call my wife, too. She'll be happy because I wanted to make a trip and she didn't want to go and I think that was the time so she'll be very happy.

Okay. We'll stand in recess.

(Court recessed, 2:15 p.m.)

- - --

(Court reconvened, 3:15 p.m.)

THE COURT: Okay.

MR. BROWNWELL: Your Honor, we've had some discussions with everyone and we do have some conflicts that first week in May with a vacation. We were wondering if appropriate and your Honor would be willing if we could have just a discussion in chambers about --

THE COURT: Come on back. Whoever is involved, they are welcomed to come.

We'll take a short recess.

Also the trip I wanted to take, it's all sold out.

Come on back.

(Court recessed, 3:20 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB Plaintiff-Intervenors v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT:

ATTACHMENT 3

DTE Energy Company
2000 2nd Ave., Detroit, MI 48226-1279

DTE Energy

VIA CERTIFIED MAIL

September 19, 2007

Mr. William Presson, Acting Supervisor
Permit Section
Air Quality Division
Michigan Department of Environmental Quality
525 W. Allegan
Constitution Hall - 3rd Floor North Tower
P.O. Box 30260
Lansing, MI 48933

Re: **2007 Planned Outage Notification - Belle River Power Plant (B2796), Unit 2**

Dear Mr. Presson:

Detroit Edison periodically removes its generating units from service for up to three months to perform maintenance, repair, and replacement activities that cannot otherwise be done with the unit in operation. Typically, this occurs on a 2-3 year cycle. Occasionally a unit is taken out of service for planned shorter duration to perform less extensive work. The upcoming periodic outage at the Belle River Power Plant on the Unit 2 begins on or about September 28, 2007, and is scheduled to last for approximately 10 weeks. During the outage, the following projects are being undertaken: (1) electrical system repairs and replacements, (2) boiler system repairs and replacements. These projects are exempt under Michigan air rules, therefore no permitting activity is required (see **Attachment A**).

We are providing notice that these projects are taking place based on the federal NSR rules promulgated on December 31, 2002 and that became effective on March 3, 2003 (the 2002 rules). The 2002 rules require notification, additional record keeping, and annual reporting whenever *"there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase...."* For the reasons discussed below, Detroit Edison believes there is no reasonable possibility that the proposed projects will result in a significant emissions increase and thus, the requirements do not apply. However, the AQD PSD Workbook (October 2003) does not specifically address this issue. Therefore, Detroit Edison is providing this notice of the Belle River Unit 2 planned maintenance outage even though there is no expected increase in emissions as a result of the planned projects. We do not believe this notice is required by federal or state regulations.

The *"actual-to-projected-actual applicability test"* set forth in 40 CFR 52.21(a)(2)(iv)(c) requires a comparison of *"baseline actual emissions"* and *"projected actual emissions."* *"Baseline actual emissions"* are defined in 40 CFR 52.21(b)(48). The representative baseline period for defining past emissions for Belle River Unit 2 has been determined to be the two-year period, calendar years 2000-2001. This baseline period was established in the October 7, 2005

Outage Notification submitted for the Unit 2 periodic outage that took place during October-December 2005. Net generation and capacity factor data are from the Detroit Edison Power Plant Performance Management (P3M) system records. Particulate emissions are based on fuel characteristics and EPA emission factors. Heat input, sulfur dioxide, and nitrogen oxide emissions are from continuous emission monitoring system (CEMS) data presented in the EPA Annual Acid Rain Scorecard reports. Baseline emissions and other operating characteristics are shown in **Table 1**.

"Projected actual emissions," as defined in 40 CFR 52.21(b)(41), are also shown in **Table 1**, along with a comparison of projected and baseline actual emissions. This comparison shows that the projects will not result in an emissions increase. The projected actual emissions in **Table 1** were calculated as follows: First, PROMOD projections (production cost model output) were calculated based on the unit's expected post-outage maximum annual utilization during the period 2008-2012 with fuel characteristics similar to the baseline period. The projected maximum post-outage annual utilization (estimated to occur in 2008) was obtained from the PROMOD analysis that is performed each year to establish the Detroit Edison 5-year generation plan. As required under the regulation, we then excluded from the PROMOD projections *"any portion of the emissions increase that could have been accommodated ... and is unrelated to the change,"* including increases due to demand and market conditions or fuel quality per 40 CFR 52.21(b)(41)(ii)(c). (See **Table 1**.)

It should be pointed out that emissions and operations fluctuate year-to-year due to market conditions and in any individual year could very well exceed baseline levels. Obviously, since the baseline represents a 2-year average, one of those years was above the baseline and one below. At some point in the future, baseline levels may be exceeded again, but not as a result of this outage. Future unit utilization is also a function of expected electricity market conditions. Many factors influence market demand – weather, availability of other units, transmission limitations, electrical system security, etc. Moreover, fuel quality could change. As mentioned above, the federal NSR rules direct one *"to subtract out"* from projected actual emissions *"...any portion of the emissions increase that could have been accommodated ... and is unrelated to the change,"* including increases due to demand growth or fuel quality [40CFR52.12(b)(41)(ii)(c)].

The 2003 rules, issued by the EPA on August 27, 2003, provided a more clearly defined interpretation of *"routine maintenance, repair and replacement"* (RMRR) activities and also clarified the term *"change"* for purposes of NSR. Detroit Edison believes the new equipment replacement provision (ERP) of the 2003 rules provides clarity, flexibility and certainty to the NSR process. Significantly, the interpretation of the term *"change,"* described in detail in the preamble to the rules, would specifically allow MDEQ to implement this interpretation notwithstanding the recent stay of the ERP rule by the D.C. Circuit Court. Again, as stated above, Detroit Edison believes that the activities included in this notification are excluded from NSR.

All of the replacement components are identical or functionally equivalent to the equipment now in service, they cost significantly less than 20% of the replacement value of the process unit, and

they do not change the basic design parameters of Belle River Unit 2, which will continue to meet enforceable emission and operational limitations. Moreover, the Utility Air Regulatory Group (UARG), an organization of which Detroit Edison is a member, submitted to the EPA NSR Docket during the comment period a list of repair and replacement activities that utilities must perform to keep electric generating facilities operational. EPA, on page 50 of the 2003 RMRR Preamble stated, *"We have reviewed the list of projects supplied by UARG and have concluded that these types of replacement activities are important to maintaining, facilitating, restoring or improving the safety, reliability, availability, or efficiency of process units. Therefore, generally speaking, these types of individual activities and groups of activities should qualify for the ERP and be excluded from major NSR without case-specific review."* DTE has previously provided to your office a copy of the UARG document as part of the Monroe Unit 1 Planned Maintenance Outage Notification dated January 21, 2004.

If you have questions on this notification, please contact me at (313) 235-7023 or via email at ***rugensteinw@dteenergy.com***.

Sincerely,

Wayne A. Rugenstein
Principal Environmental Engineer
Environmental Management & Resources

Attachment

FILE: BRVPP U2 Planned Outage 2007 - NSR Notification.doc

Cc: J. C. Dau
J. T. Goodman
T. Seidel, AQD Warren

ATTACHMENT A

Planned Outage Activity Summary
Belle River Power Plant – Unit 2

The following major activities will be performed during the 2007 periodic outage on Belle River Unit 2 scheduled to begin September 28, 2007. These activities are exempt under the Michigan Air Pollution Rules as outlined below:

- **Electrical System Repairs and Replacements** – Replace bushings on the East and West Auxiliary Transformers. These activities are exempt under MAPR 285(b).
- **Boiler System Repairs and Replacements** – Replace sections of tubing in Superheat, Bullnose and Waterwall areas of the boiler. These activities are exempt under MAPR 285(a)(iv).

Table 1
Belle River Power Plant - Unit 2
Comparison of Actual and Projected Actual Emissions & Operations

	Baseline Actual per 40CFR52.21(b)(48)(I)[1]	PROMOD Projection per 40CFR52.21(b)(41)(ii)(a)[2]	Emissions Excluded per 40CFR52.21(b)(41)(ii)(c)	Projected Actual Emissions per 40CFR52.21(b)(41)(ii)	Emission Change
Period	**January 2000-December 2001**	**January 2008-December 2008[3]**			
Unit Electrical Capacity, MW_{net}	635	635			
Net Generation, MWh	4,536,446	4,558,408			
Annual Capacity Factor	81.5%	81.7%			
Heat Input, mmBtu	50,223,235	46,280,555			
SO2, lb/mmBtu	0.56	0.56			
NOx, lb/mmBtu	0.26	0.26			
PM, lb/mmBtu	0.003	0.003			
SO2, tons	14,182	13,069	0	13,069	(1,113)
NOx, tons	6,650	6,128	0	6,128	(522)
PM, tons	71	69	0	69	(2)

Notes:

(1) Baseline values are the average of two consecutive operating years.

(2) PROMOD projections are based on the maximum utilization for the period 2008-2012, as taken from the DTE Energy Rate Case submittal to the Michigan Public Service Commission in March 2007.

(3) Values in Rate Case submittal for unit generation and heat input only reflected DTE Energy 81.41% ownership of Belle River Unit 2, so values in this document for 2009 have been adjusted to reflect total operation of the unit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB Plaintiff-Intervenors v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT:

ATTACHMENT 4

DTE Energy Company
2000 2nd Ave., Detroit, MI 48226-1279

VIA CERTIFIED MAIL

DTE Energy

March 6, 2007

Ms. Lynn Fiedler, Supervisor
Permit Section
Air Quality Division
Michigan Department of Environmental Quality
525 W. Allegan
Constitution Hall - 3rd Floor North Tower
P.O. Box 30260
Lansing, MI 48933

Re: **2007 Planned Outage Notification - Trenton Channel Power Plant (B2811), Unit 9A**

Dear Ms Fiedler:

Detroit Edison periodically removes its generating units from service for up to three months to perform maintenance, repair, and replacement activities that cannot otherwise be done with the unit in operation. Typically, this occurs on a 2-3 year cycle. Occasionally a unit is taken out of service for a planned shorter duration to perform less extensive work. During the upcoming seven (7) week outage at the Trenton Channel Power Plant on Unit 9A that begins on or about March 16, 2007, the following major projects are being undertaken: (1) turbine generator system repairs and replacements, (2) boiler system repairs and replacements, (3) coal mill system repairs and replacements, and (4) electrical system repairs and replacements. All four are exempt under Michigan air rules and no permitting activity is required (see Attachment A). In the electric utility industry, these projects represent routine maintenance, repair and replacement activities.

We are providing notice that these projects are taking place based on the recently promulgated Michigan Prevention of Significant Deterioration (PSD) rules [R336.2801-2830] that became effective on December 4, 2006. Prior to that date all planned outage notifications for Detroit Edison units were submitted under the federal New Source Review (NSR) rules promulgated on December 31, 2002 and that became effective in Michigan on March 3, 2003 (the 2002 rules). The 2002 rules required notification, additional record keeping, and annual reporting whenever *"there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase...."* For the reasons discussed below, Detroit Edison continues to believe there is no reasonable possibility that the proposed projects will result in a significant emissions increase and thus, the requirements do not apply. However, until USEPA and/or the federal courts provide a clear definition of what constitutes routine maintenance, repair and replacement, Detroit Edison will follow the requirements of Rule 1818(3). Accordingly, this outage notification for Trenton Channel Unit 9A, and all subsequent outage notifications submitted by Detroit Edison will continue to follow the format of prior

notifications, even though there is no expected increase in emissions as a result of the planned projects. We continue to believe this notice is not required by federal or state regulations.

The NSR applicability test requires a comparison of past actual and projected emissions. *"Baseline actual emissions"* are defined in Michigan Air Rule (MAR) 1801(b). The baseline period for defining past emissions for Trenton Channel Unit 9A was selected to be the two-year period in calendar years 2005-2006. Net generation and capacity factor data for this period are obtained from the Detroit Edison Power Plant Performance Management (P3M) system records. Particulate emissions are based on fuel characteristics and EPA emission factors. Heat input, sulfur dioxide, and nitrogen oxide emissions are obtained from continuous emission monitoring system (CEMS) data presented in the EPA Annual Acid Rain Scorecard reports. Baseline emissions and other operating characteristics are shown in Table 1.

"Projected actual emissions," as defined in MAR 1801(ll), are also shown in Table 1, along with a comparison of projected and baseline actual emissions. This comparison shows that the projects will not result in an emissions increase. The projected actual emissions in Table 1 were calculated as follows: First, PROMOD projections (production cost model output) were calculated based on the unit's expected post-outage maximum annual utilization during the period 2006-2010 with fuel characteristics similar to the baseline period. The expected post-outage maximum annual utilization (estimated to occur in 2009) was obtained from the PROMOD analysis performed annually to establish the Detroit Edison 5-year generation plan. This projection has not changed since the notification was submitted in 2005. As required under the new rules we then excluded from the PROMOD projections *"...that portion of the unit's emissions following the project that an existing unit could have accommodated ... and that are also unrelated to the particular project,"* including increases due to demand and market conditions or fuel quality per MAR 1801(ll)(ii)(C). (See Table 1.)

It should be pointed out that emissions and operations fluctuate year-to-year due to market conditions and in any individual year could very well exceed baseline levels. Obviously, since the baseline represents a 2-year average, one of those years was above the baseline and one below. At some point in the future, baseline levels may be exceeded again, but not as a result of this outage. Future unit utilization is also a function of expected electricity market conditions. Many factors influence market demand – weather, availability of other units, transmission limitations, electrical system security, etc. Moreover, fuel quality could change. As mentioned above, the Michigan air rules direct one to exclude from projected actual emissions *"...that portion of the unit's emissions following the project that an existing unit could have accommodated ... and that are also unrelated to the particular project,"* including increases due to demand growth or fuel quality changes per MAR 1801(ll)(ii)(C).

All of the replacement components are identical or functionally equivalent to the equipment now in service, and they do not change the basic design parameters of Trenton Channel Unit 9A, which will continue to meet enforceable emission and operational limitations. Moreover, the Utility Air Regulatory Group (UARG), an organization of which Detroit Edison is a member, has

submitted to the EPA NSR Docket during prior comment periods a list of repair and replacement activities that utilities must perform to keep electric generating facilities operational.[1] These activities are considered routine in the electric utility industry. Furthermore, MAR 1801(aa)(iii)(A) specifies that routine maintenance, repair and replacement activities are not major modifications. Therefore, Part 18 requirements do not apply to these projects.

If you have questions on this notice, please contact me at (313) 235-7023 or via email at ***rugensteinw@dteenergy.com***.

Regards,

Wayne A. Rugenstein
Principal Environmental Engineer
Environmental Management & Resources

Attachments

FILE: TCHPP U9A Planned Outage 2007 - NSR Notification.doc

Cc: D. J. Braker
N. J. Chuey
E. A. Jordan
S. A. Marek
W. McLemore - MDEQ Detroit
S. G. Pfeuffer
T. Seidel - MDEQ Warren

[1] DTE has previously provided to your office a copy of the UARG document as part of the Monroe Unit 1 Planned Maintenance Outage Notification dated January 21, 2004.

ATTACHMENT A

Trenton Channel Power Plant Unit 9A Outage Summary

The following activities will be performed during the outage scheduled to begin on or about March 16, 2007, and are exempt under the Michigan Air Pollution Rules as outlined below:

- **Turbine Generator System Repairs and Replacements** - The turbine will undergo an upgrade of the turbine supervisory system. This work is exempt under MAR 285(a) and (b).

- **Boiler System Repairs and Replacements** – The Alstom economizer will be replaced, as will most boiler tube thermocouples. The boiler main oil gun and the air and oil actuator will be replaced. These activities are exempt under MAR 285(a)(iv) and 285(b).

- **Coal Mill System Repairs and Replacements** – A coal mill feeder will be replaced. This work is exempt under MAR 285(a) and (b).

- **Electrical System Repairs and Replacements** – A 480 V breaker control will be upgraded. This work is exempt under MAR 285(a) and (b)

Table 1
Trenton Channel Power Plant - Unit 9
Comparison of Actual and Projected Actual Emissions & Operations

	Baseline Actual Emissions per MAR 1801(b)[1][2]	PROMOD Projection per MAR 1802(ll)(ii)(A)[3]	Emissions Excluded per MAR 1802(ll)(ii)(C)	Projected Actual Emissions per MAR 1802(ll)(ii)	Emission Increase
Period	**January 2005-December 2006**	**January 2009-December 2009**			
Unit Electrical Capacity, MW_{net}	520	520			
Net Generation, MWh	3,085,380	3,049,000			
Annual Capacity Factor	67.8%	69.8%			
Heat Input, mmBtu	28,050,004	29,929,000			
SO2, lb/mmBtu	1.25	1.25			
NOx, lb/mmBtu	0.18	0.18			
PM, lb/mmBtu	0.03	0.03			
SO2, tons	17,483	18,654	1,171	17,483	0
NOx, tons	2,498	2,665	167	2,498	0
PM, tons	366	391	25	366	0

Notes:

(1) Michigan Air Rule (MAR)

(2) Baseline values are the average of two consecutive operating years

(3) PROMOD projections are based on the maximum utilization for the period 2006-2010 as shown in the DTE Energy - Detroit Edison Power Supply Cost Recovery (PSCR) filing on Sep 30, 2005 with the Michigan Public Service Commission

Bcc: S. P. Dugan
G. L. Ryan

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB Plaintiff-Intervenors v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

UNITED STATES' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT:

ATTACHMENT 5

DTE Energy Company
One Energy Plaza, Detroit, MI 48226-1221

VIA CERTIFIED MAIL
7000-1530-0001-8724-3797

DTE Energy

February 26, 2010

Ms. Teresa Seidel, District Supervisor
Air Quality Division
Southeast Michigan District Office
MI Department of Natural Resources & Environment
2770 Donald Court
Warren, MI 48092-2793

Re: **2009 NSR Emissions Report for Trenton Channel Power Plant**

Dear Ms. Seidel:

DTE Energy is hereby submitting to the Michigan Department of Natural Resources & Environment (MDNRE) the 2009 New Source Review (NSR) emissions report for the Trenton Channel Power Plant. Unlike earlier annual reports, which until 2007 were submitted for individual units, the 2009 report combined information from High Pressure Boilers and from Unit 9A into a single document. Subsequent reports will follow the same format. The report is submitted following the annual reporting requirements for existing electric utility steam generating units promulgated in R 336.2818(3)(d) of the Michigan NSR Air Rules. Accordingly,

> *"(d) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the department within 60 days after the end of each year [emphasis added] during which records are generated under subdivision (c) of this subrule setting out the unit's annual emissions during the calendar year [emphasis added] before submission of the report."*

Table 1 compares the 24-month baseline emissions, fuels and operating parameters with actual information for 2009 operation. The operating and fuels information for both periods is extracted from the DTE Energy Power Plant Performance Management (P3M) data base. Heat input and SO_2 and NO_X emission data are based on continuous emission monitoring system (CEMS) required under the USEPA Acid Rain Program as promulgated in ***§40 CFR 75***. Particulate matter (PM) emissions are calculated from estimated electrostatic precipitator (ESP) control efficiencies and fuels information.

When comparing baseline emissions with 2009 actual emissions in Table 1, if the 2009 actual emissions are below baseline emissions, then no further explanation is required for the annual report. However, if one or more of the annual emissions levels exceeds the baseline emissions, then further evaluation is provided. In some situations the 2009 emissions increases may be excluded under Michigan NSR rule R 336.2801(ll)(ii)(C), since they could have been accommodated during the baseline period, and were not related to the outage maintenance activities that led to the establishment of the baseline, as cited below:

"(C) Exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth."

Additional clarification is provided in the USEPA's Detroit Edison Applicability Determination[1] provides further clarification of the emission exclusion process by stating

"...Detroit Edison may exclude emissions increases that are caused by other factors, for example, emission increases that it demonstrates are due to variability in control technology performance or coal characteristics."

Often additional tables and/or charts are included to provide additional analytical information and historical perspective to control technology performance and fuel variability. Other factors such as demand may also be considered.

Finally, Part 18 of the Michigan Air Rules allows an existing utility steam generating unit to use a different baseline period for each pollutant under the definition of *"Baseline Actual Emissions"* in ***R336.2801(b)(i)(C)*** as follows:

"(C) For a regulated new source review pollutant, if a project involves multiple emissions units, then only 1 consecutive 24-month period shall be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period may be used for each regulated new source review pollutant." [Emphasis added]

DTE Energy may utilize this pollutant-specific baseline option in certain situations, if appropriate

The following paragraphs discuss the comparisons of baseline versus actual annual emissions for Trenton Channel Unit 9A and for the High Pressure Boilers. Supporting information is included as appropriate.

Unit 9A

Current Baseline Period: March 2004- February 2007

DTE Energy hereby provides notification that the baseline period for fuels and operating parameters for this unit have been revised from the past baseline period. Past baseline established

[1] Appended to this report are the specific excerpts from the Detroit Edison Applicability Determination (Attachment 1) that apply to exclusions and other factors.

with March 6, 2007 outage notification for planned seven (7) week periodic outage that started in mid March 2007.

Under the pollutant-specific baseline provisions above, DTE Energy is also providing notification that the pollutant specific baseline period for NO_x emissions from Trenton Channel 9A is hereafter taken to be the 24-month period from September 2007-August 2009. Likewise, the pollutant-specific baseline period for SO_2 emissions is hereafter taken to be the 24-month period from June 2007-May 2009.

2009 Emissions and Operation:

Table TC9A-1 demonstrates that SO_2 and particulate matter (PM) emissions were below baseline levels. The 2009 NO_X emissions were 2,636 tons, which is 6 tons above the 2,630 ton baseline level. The NO_X emissions above 2,630 tons were excluded, as allowed under the Michigan air rules in R336.2801(ll)(ii)(C) cited above. **Figure TC9A-1** provides a historical perspective to the 2009 NOx emissions increase, showing that the monthly NO_x emissions were well within the historic NOx variability for Trenton Channel Unit 9A. Furthermore, the NO_X emissions could have been accommodated during the baseline period, and were not related to the activities of the March 2007 maintenance outage.

High Pressure (HP) Boilers

Current Baseline Period: September 2004-August 2006

DTE Energy hereby provides notification that the baseline period for fuels and operating parameters for this unit have been revised from the past baseline period. The baseline was re-established with the September 4, 2009 outage notification for a planned six (6) week outage. Prior to the September 2009 outage the baseline was established from the September 9, 2005 outage notification for planned 4 week period outage that started in mid September 2005. (***Note:*** A corrected baseline period was submitted in February 2006.)

Under the pollutant-specific baseline provisions above, DTE Energy hereby provides notification that the pollutant specific baseline period for NO_x & SO_2 emissions from Trenton Channel HP unit is hereafter taken to be the 24-month period from January 2004-December 2005.

2009 Emissions and Operation:

Table TCHP-1 provides a comparison of the baseline and 2009 actual emissions, fuels and operating parameter for St Clair Unit 1. The emissions in the table show that SO_2, NO_X, and particulate emissions for the calendar year 2009 were all below the respective levels from the baseline period. Based on these comparisons, there has been no increase in emissions during 2009 as a result of the activities during the 2005 periodic outage.

If you have questions on the information supplied in the 2009 NSR Annual Report for Trenton Channel Power Plant, please contact me at (313) 235-4698, or by email at ***gossiauxk@dteenergy.com*** or Mr. Wayne Rugenstein at (313) 235-7023, or by email at ***rugensteinw@dteenergy.com***.

Regards,

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Air Drive File: Annual NSR Report (2009) - TCHPP.doc

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TABLE TC9A-1

Trenton Channel Power Plant - Unit 9A
Comparison of Baseline and Actual Emissions & Operations

	Baseline Actual [1]	Alternate Pollutant-Specific NO_x Baseline Actual [4]	Alternate Pollutant-Specific SO_2 Baseline Actual [4]	2009 Actual [3]	Emissions Excluded	Representative Actual Annual Emissions	Emissions Change
Period (Annual)	March 2005-February 2007 [2]	September 2007-August 2009	June 2007-May 2009	January 2009-December 2009			
Unit Capacity, MW	520	520	520	520			
Net Generation, MWh	3,131,899			3,119,737			
Capacity Factor	68.8%			68.5%			
Heat Input, mmBtu	28,518,177	28,717,041	28,570,550	28,805,311			
Turbine Running Hours	7,031			8,417			
Coal Consumption, tons	1,452,798			1,442,207			
Ash Content, %	6.1			6.0			
Sulfur Content, %	0.68			0.69			
SO2, lb/mmBtu			1.31	1.24			
NOx, lb/mmBtu		0.18		0.18			
PM, lb/mmBtu	0.03			0.02			
SO2, tons			18,733	17,926	0	17,926	(807)
NOx, tons		2,630		2,636	6	2,630	0
PM, tons	357			356	0	356	(51)

Notes:

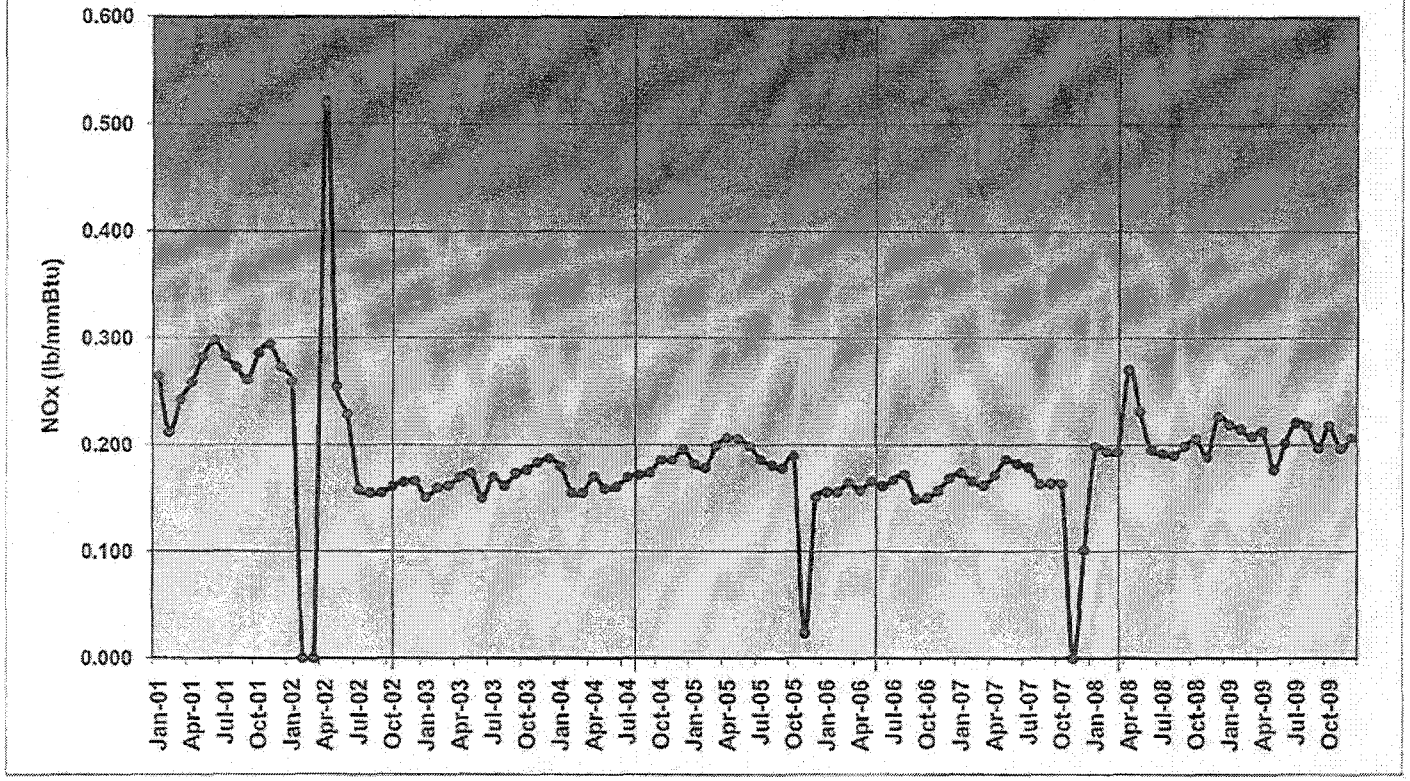
(1) Baseline values are a 12-month average of a selected 24-month consecutive operating period

(2) Baseline period re-established in 2009 NSR Annual Report

(3) Actual values are from CEMS and the Fossil Generation PSM data base for 2009

(4) Alternative Pollutant-specific baselines are allowed under Michigan Air Rule R 336.2801(b)(i)(C)

Figure TC9A-1
Monthly NOx Emissions - TCHPP Unit 9A
2001-2009



FILE: TCHPP 9A 2009 NOx By Month Chart.xls
TAB: Monthly NOx Chart

TABLE TCHP-1

Trenton Channel Power Plant - High Pressure Boilers
Comparison of Baseline and Actual Emissions & Operations

	Baseline Actual [1]	Alternate Pollutant-Specific NO_x & SO_2 Baseline Actual [5]	2009 Actual [3]	Emissions Excluded	Representative Actual Annual Emissions	Emissions Change
Period (Annual)	September 2004-August 2006 [2]	January 2004-December 2005	January 2009-December 2009			
Unit Capacity, MW	210	210	210			
Net Generation, MWh	1,213,053		748,518			
Capacity Factor	65.9%		41.0%			
Heat Input, mmBtu	17,434,154	18,412,828	10,822,410			
Turbine Running Hours [4]	15,609		11,023			
Coal Consumption, tons	850,924		570,248			
Ash Content, %	6.0		5.7			
Sulfur Content, %	0.66		0.63			
SO2, lb/mmBtu		1.28	1.39			
NOx, lb/mmBtu		0.42	0.47			
PM, lb/mmBtu	0.025		0.031			
SO2, tons		11,768	7,517	0	7,517	(4,251)
NOx, tons		3,855	2,526	0	2,526	(1,330)
PM, tons	220		169	0	169	(51)

Notes:

(1) Baseline values are a 12-month average of a selected 24-month consecutive operating period

(2) Baseline period re-established in 2009 NSR Annual Report

(3) Actual values are from CEMS and the Fossil Generation P3M data base for 2009

(4) Turbine hours are for two turbines, Nos. 7A and 8, that can receive steam from any of the four (4) high pressure boilers

(5) Alternative Pollutant-specific baselines are allowed under Michigan Air Rule R 336.2801(b)(i)(C)

Attachment 1

Emission increases that result from fuel or control equipment variability do not trigger PSD

Page 21 of the EPA detailed analysis in the May 23, 2000 Detroit Edison Applicability Determination[2] states:

> *"The PSD regulations also require Detroit Edison to maintain and submit to the delegated permitting agency, for a period of 5 years from the date the units resume regular operation following completion of the Dense Pack project, information demonstrating that the project did not result in an emission increase. To adequately track post-change emissions, EPA expects that this information must include records on annual fuel use, hours of operation, and fuel sulfur content. In making these calculations,* ***Detroit Edison may exclude emissions increases that are caused by other factors, for example, emissions increases that it demonstrates are due to variability in control technology performance or coal characteristics.*** *In addition, when calculating emission increases, under current regulations Detroit Edison may exclude that portion of its emissions attributable to increased use at the unit due to the growth in electrical demand for the utility system as a whole since the baseline period. See 40 C.F.R. § 52.21(b)(33)(ii)." (emphasis added)*

Consequently, if it is clear from a comparison of baseline and future year emissions and operating data that any increase in annual PM emissions was the result of the consumption of higher ash coal and/or below average control equipment efficiency, then that increase could be excluded when calculating actual annual emissions.

[2] "Detroit Edison Applicability Determination" sent to Henry Nickel, Counsel for the Detroit Edison Company, Hunton & Williams, Washington DC, on May 23, 2000 from Francis X. Lyons, Regional Administrator, United States Environmental Protection Agency, Region 5, Chicago, IL